

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL JAVIER MARTINEZ,

Defendant and Appellant.

G045646

(Super. Ct. No. 05CF1582)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, James H. Flaherty III, and Scott Taylor Deputy Attorneys General, for Plaintiff and Respondent.

Paul Javier Martinez appeals from a judgment after a jury convicted him of willful, deliberate, and premeditated attempted murder and aggravated assault and found true he personally used a deadly weapon and inflicted great injury. Rodriguez has one contention on appeal: the trial court erred in admitting the testimony of the gang expert. We disagree and affirm the judgment.

FACTS

In December 2004, Ken Murdock, a bouncer at Kelly McCue's bar in Mission Viejo, saw a very intoxicated Sylvester Valencia arguing with his girlfriend Lindsey/Linzy Juardo. Juardo walked away and began talking and dancing with Diego Vera. Valencia pushed a barstool to the ground, and Murdock asked him to relax. Valencia considered the exchange between his girlfriend and Vera to be flirtatious and he walked to Vera. Martinez, who had come to the bar with Vera and others, sat nearby. Valencia told Vera that Juardo was his girlfriend. Vera told Valencia that he was from "L.A." and he was in a gang. Valencia put up his hands and said, "Okay." Minutes later, without warning or any provocation by Valencia, Martinez attacked Valencia.

Valencia felt Martinez punch him in the left side of the neck. Kiersten Williams, a bar patron, who was slightly intoxicated was outside on the patio smoking. With her face pressed against the glass, Williams saw Martinez with his arm raised above his head with a knife in his hand. Murdock, who saw Martinez strike Valencia, tried to stop the attack. From behind, Murdock grabbed Valencia around the arms, rendering Valencia defenseless. As Murdock dragged Valencia away, Martinez stabbed him. Williams saw Martinez stab Valencia three times, including in the neck. Vera joined in and punched Valencia in the face. Realizing Valencia was defenseless, Murdock let him go.

Valencia jumped up to fight. Murdock saw his hands were covered in blood and saw blood gushing from Valencia's neck. Murdock told Valencia to stop

because he was severely injured. Valencia went unconscious. Two off duty medics administered medical aid to Valencia.

Martinez and a woman ran out the back door and got into a sports utility vehicle and drove away. Law enforcement officers stopped the vehicle and arrested Martinez.

Valencia underwent emergency surgery. Martinez stabbed him three times, in the neck, chest, and arm. Forensic analysis later revealed Valencia's blood was on Martinez's shirt and Vera's hand.

In July 2005, an information charged Martinez with willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))¹ (count 1), and aggravated assault (§ 245, subd. (a)(1)) (count 2).² As to count 1, the information alleged Martinez personally used a deadly weapon (§ 12022, subd. (b)(1)). With respect to counts 1 and 2, the information also alleged Martinez inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged Martinez suffered a prior prison term within the meaning of section 667.5, subdivision (b).

At his first trial, after the trial court granted Martinez's motion to sever his case from Vera's case, the jury convicted Martinez of both counts and found true the enhancements. The trial court granted Martinez's new trial motion on the ground he was denied his constitutional right to a public trial and vacated the jury's verdicts. While Martinez awaited a new trial, Vera was murdered in a drive-by shooting.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² The information charged Vera with these counts and two additional counts, street terrorism (§ 186.22, subd. (a)) (count 3), and aggravated assault (§ 245, subd. (a)(1)) (count 4).

Before his second trial, the prosecutor moved to admit gang expert testimony, and evidence of Martinez's tattoos and a jailhouse letter he wrote.³ At an Evidence Code section 402 hearing, Detective Julian Rodriguez, a gang expert from the Santa Ana Police Department gang unit, testified. Rodriguez detailed his training and experience investigating criminal street gangs in Los Angeles and Orange counties. He reviewed the circumstances of the case and Martinez's and Vera's background. With respect to Vera, Rodriguez opined he was a member of "18th Street" (18th Street) gang based on his prior contacts with law enforcement, his self-admission he was a gang member, his tattoo, jail letters, and court records. As to Martinez, Rodriguez opined that at the time of the offenses Martinez was a member of "Westside Santa Barbara" (Westside Santa Barbara) gang based on the following: A Santa Barbara police report from 1992 indicated Martinez and others attacked a man and claimed to be Westside Santa Barbara gang members; a field identification card indicated that in April 2004, Martinez admitted to an Azusa Police Officer he was a member of Westside Santa Barbara; a tattoo of "WB" on the right side of his neck and "SUR 13," which stands for Southside and signifies an affiliation with the Mexican Mafia, on his forearm; jail letters where Martinez refers to himself by his gang moniker, "Psycho" and states he is a member of Westside Santa Barbara; and photographs of Martinez with 18th Street gang members.

Rodriguez concluded that both Vera and Martinez were members of different gangs, but when Martinez relocated to Los Angeles from Santa Barbara, Martinez began associating with Vera's gang but did not quit his affiliation with Westside Santa Barbara. Rodriguez opined that Martinez provided back up for Vera when Valencia disrespected Vera. Rodriguez admitted 18th Street and

³

The court excluded evidence of the jailhouse letter and Martinez's tattoos.

Westside Santa Barbara have no relationship with one another and there was no evidence Martinez previously committed crimes with anyone from 18th Street.

The prosecutor explained she was offering Rodriguez's testimony on the issue of motive for the limited purpose of showing Martinez and Vera were gang members and gang members back up each other. The prosecutor stressed that because there were no gang charges, she would not be offering evidence of Martinez's prior contacts or any other gang evidence to establish he was an active participant in a criminal street gang. Relying on *People v. Gonzalez* (2005) 126 Cal.App.4th 1539 (*Gonzalez*), the prosecutor stated that without this testimony, the jury would not understand why a complete stranger would stab someone in a bar who was not a gang member. Defense counsel responded the court would instruct the jury on motive and the jury would likely understand based on everyday experience what can happen in a bar where you have "[l]ots of young alcohol-fueled, testosterone-filled males." Relying on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), defense counsel added not only was the evidence not relevant, it was highly prejudicial because when any jury hears gang evidence, they convict.

The trial court asked assuming the evidence was relevant, how would the prosecutor respond to defense counsel's assertion the evidence was unduly prejudicial. The court said, "Because it's going to be prejudicial. No question about it. It's prejudicial." As she stated previously, the prosecutor said she was offering limited evidence of Martinez's and Vera's gang membership and gang culture concerning gang members backing up each other on the issue of motive. The court recessed to review the applicable legal authority. When back on the record, the court stated that based on the totality of the gang indicia, Martinez was a Westside Santa Barbara gang member. The court relied on Martinez's prior contacts, his tattoos, and his self-admissions. With respect to Evidence Code section 352, the court found *Gonzalez* dispositive and *Albarran* distinguishable and concluded the significant probative value of the evidence outweighed

its prejudicial impact. The court cautioned the prosecutor to use “extreme caution” when questioning Rodriguez and limit questioning to the areas discussed.

At trial, Valencia testified concerning his exchange with Vera. Valencia stated he was not and had never been in a gang and he did not know much about gangs. He explained that when Vera told him that he was in a gang, Valencia was “taken aback by it” because it was not important to him. Valencia added that he did not know what to do with the information and his overall reaction to Vera’s claim was one of indifference.

Rodriguez testified for the prosecution. After detailing his background, training, and experience, Rodriguez testified concerning the culture and habits of traditional, turf-oriented Hispanic criminal street gangs, including the importance of respect within gangs, and the concepts of claiming a gang and backing up gang confederates. Rodriguez said being respected is analogous to being feared in gang culture and gang members earn respect through various methods, including committing violent or economic crimes, or being a lookout or a back up. He explained that claiming a gang is when a person states what gang he is from, it is considered a challenge, and it oftentimes leads to a violent confrontation. Rodriguez testified that a gang member would feel disrespected if the gang member challenged a person and the person did not take the challenge seriously. He added the gang member would most likely retaliate violently. Rodriguez said gang members have a duty to back up other gang members, which would include assisting in a fight. He said weapons are extremely important in gangs and if a gang members is carrying a weapon, the gang member “has taken on the responsibility of they are going to use it.” Based on his review of background information of Martinez and Vera, Rodriguez opined that at the time of the offenses both were active gang members. Rodriguez’s testimony established Vera was a member of a Los Angeles criminal street gang, “18th Street,” and Martinez was a member of a Santa Barbara gang, “Westside Santa Barbara.” Rodriguez concluded that before the offenses, Martinez moved to Los Angeles and began association with 18th Street gang

members. Defense counsel renewed his objection to the admission of Rodriguez's testimony.

Martinez offered the testimony of Officer William Kim, who responded to the bar and spoke with Murdock and Williams. Defense counsel questioned Kim about what Williams and Murdock told him in an attempt to undermine their credibility before the jury. Martinez also offered the testimony of expert witnesses who testified concerning memory and the affect alcohol has on the ability to remember.

As relevant here, the trial court instructed the jury with CALCRIM No. 1403, "Limited Purpose of Evidence of Gang Activity," which provided as follows: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant had a motive to commit the crimes charged. [¶] OR [¶] The defendant actually believed in the need to defend himself. [¶] OR [¶] The defendant acted in the heat of passion. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose, including evidence of premeditation and deliberation. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

The jury again convicted Martinez of both counts and found true the enhancements. In a bifurcated trial, the jury found true he suffered a prior prison term. The trial court sentenced Martinez to prison for life with the possibility of parole on count 1 and a consecutive five-year term on count 1's accompanying enhancements and the prior prison term allegation. The court stayed or struck the remaining sentences.

DISCUSSION

Martinez argues the trial court erred in admitting Rodriguez's testimony because it was irrelevant, speculative, unduly inflammatory, prejudicial, and violated his federal constitutional rights. None of his contentions have merit.

Relevance and Foundation

Martinez contends Rodriguez’s testimony was irrelevant and speculative. We disagree.

“California courts have long recognized the potential prejudicial effect of gang evidence. As a result, our Supreme Court has condemned the introduction of such evidence ‘if only tangentially relevant, given its highly inflammatory impact.’ [Citation.]” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 (*Samaniego*).) “Gang evidence should not be admitted at trial where its sole relevance is to show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]” (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) “Nonetheless, evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. [Citations.]” (*Samaniego, supra*, 172 Cal.App.4th at p. 1167.)

In cases not involving the gang enhancement, the California Supreme Court explained, “gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including . . . membership, . . . practices, . . . and the like—can help prove . . . motive, . . . specific intent, . . . or other issues pertinent to guilt of the charged crime. [Citations.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) “[E]ven where gang membership is relevant, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.)

“Motive is always relevant in a criminal prosecution.” (*People v. Perez* (1974) 42 Cal.App.3d 760, 767.) “The People are entitled to ‘introduce evidence of gang

affiliation and activity where such evidence is relevant to an issue of motive or intent.’ [Citation.]” (*Gonzalez, supra*, 126 Cal.App.4th at p. 1550.) “Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.]” (*Samaniego, supra*, 172 Cal.App.4th at pp. 1167-1168.) “[W]here evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial. [Citations.]” (*People v. Martin* (1994) 23 Cal.App.4th 76, 81; *Martinez, supra*, 113 Cal.App.4th at p. 413.) “[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.’ [Citations.]” (*Gonzalez, supra*, 126 Cal.App.4th at p. 1550.)

“Expert testimony repeatedly has been offered to show the ‘motivation for a particular crime, generally retaliation or intimidation’ [Citation.]” (*Gonzalez, supra*, 126 Cal.App.4th at p. 1550.) “Evidence of gang sociology and psychology is beyond common experience and thus a proper subject for expert testimony. [Citation.]” (*Martinez, supra*, 113 Cal.App.4th at p. 413.) *Gonzalez* is instructive.

In *Gonzalez, supra*, 126 Cal.App.4th at page 1542, defendant was convicted of attempted premeditated murder and assault by a state prisoner with multiple enhancements. At trial, a gang expert testified in detail about the activities of the Mexican Mafia. On appeal, defendant claimed the expert’s testimony went to defendant’s subjective intent and knowledge because he equated the behavior of all Hispanic gang members with the behavior of defendant. The appellate court disagreed and affirmed the judgment. (*Id.* at p. 1549.) The *Gonzalez* court noted that expert testimony has repeatedly been offered “to show the ‘motivation for a particular crime, generally retaliation or intimidation.’” The court concluded the trial court did not abuse its discretion in admitting the expert’s testimony because the prosecutor did not ask the expert any hypothetical questions based on the facts of the case and the expert’s testimony did not embrace defendant’s particular knowledge or intent. The court opined,

however, the expert's testimony addressed the motives of jailhouse gang members in general, and this evidence, coupled with evidence defendant was a gang member, may have led the jury to the conclusion defendant possessed the intent to kill. The court concluded this evidence was admissible. (*Gonzalez, supra*, 126 Cal.App.4th at pp. 1549-1551.)

Here, because we must give great deference to the trial court's decision concerning the admission of evidence, we cannot conclude the court abused its discretion in admitting Rodriguez's testimony on the issue of Martinez's motive and intent. Although it does not take expert testimony to understand that a young man may come to the aid of a male friend in a bar, we cannot second guess the court's reasoned decision the jury would be aided by Rodriguez's testimony in this case. We agree a reasonable juror may have difficulty understanding the nature of what transpired. Without provocation, the silent Martinez pounced on Valencia and brutally and severely stabbed him three times. Such a response exceeds what many, if not most, jurors would consider appropriate. Yes, the jury would certainly have understood had Martinez stood up, got between Vera and Valencia, pushed him, or even punched him. But that is not what occurred.

The jury heard testimony that after the emotionally wounded boyfriend approached his competition, the competition's friend stabbed the boyfriend three times. This takes some explaining. Rodriguez's testimony about how even associate gang members back up each other explained to the jury why a gang member would react in such a severe manner to such an innocuous encounter. Rodriguez's testimony informed the jury how Martinez the gang member is "wired" to stand up for associate gang members. Thus, the court properly admitted Rodriguez's testimony on the issue of Martinez's motive and intent.

Martinez concedes there was evidence he was a self admitted member of Westside Santa Barbara. He complains though that Rodriguez's testimony lacked

foundation and was speculative. He asserts the following: (1) Rodriguez did not have any knowledge of Westside Santa Barbara; (2) Martinez was not a member of 18th Street gang and did not commit crimes with that gang; (3) The incident was not a gang confrontation because Valencia was not a gang member and neither was it in Martinez's or Vera's gang's territory or an area they were known to commit crimes; (4) Westside Santa Barbara and 18th Street were not affiliated; (5) Martinez did not claim a gang during the incident; (6) Martinez did not possess the knife for a gang-related purpose; and (7) The incident did not garner respect for either gang.

“Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For ‘the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.’ [Citation.] [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

Here, Rodriguez testified he was a police officer in Los Angeles and Orange counties, had been in the gang unit for five years, and had testified over 24 times. He explained he had academic and field training and participated in hundreds of gang investigations and dozens of gang prosecutions. He was intimately familiar with Hispanic Street gangs, including 18th Street gang and Westside Santa Barbara. Although it is true Rodriguez was not familiar with Westside Santa Barbara until this case, the evidence established Westside Santa Barbara was a Hispanic gang and Martinez was a member of that gang. Nor is there any dispute Martinez and Vera, another undisputed gang member, were friends and associates. What was important about Rodriguez's

testimony is that both Martinez and Vera were members of Hispanic gangs, and how gang members react when they feel disrespected. Rodriguez's testimony provided the jury with context to help understand why Martinez, acting as Vera's back up, would commit such a nonsensical act.

Many of Martinez's complaints concern factors seen in cases where a prosecutor does allege gang charges, i.e., Valencia was not a gang member, the incident was not in Martinez's or Vera's gang territory, Martinez did not possess the knife for a gang purpose, and the offense did not garner respect for the gang. But this is not why the prosecutor offered Rodriguez's testimony. The prosecutor offered the testimony to explain how gang members react to being disrespected.

Martinez relies on *People v. Ramon* (2009) 175 Cal.App.4th 843, to suggest Rodriguez's testimony was mere speculation. *Ramon* is inapposite. In that case, the expert testified defendant committed the offenses with the specific intent to promote, further, or assist a criminal street gang based solely on the facts he was with another gang member and they were in claimed gang territory. The court concluded there was no evidence from which the expert could discern whether they were acting on their own behalf or on behalf of the gang. (*Id.* at pp. 849-851.) As we explain above, there was evidence Martinez and Vera were active participants in a Hispanic criminal street gang and Martinez reacted in a manner consistent with Rodriguez's experience investigating gang crimes. Rodriguez's testimony was relevant and rooted in the evidence.

Evidence Code section 352

Martinez argues Rodriguez's testimony was inflammatory and unduly prejudicial. Again, we disagree.

The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) "The prejudice which exclusion

of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.” The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.”” [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Although gang evidence has the potential to be extremely prejudicial, here Rodriguez’s testimony did not rise to that level. Rodriguez’s testimony was limited to his review of Martinez’s and Vera’s gang history and the culture and habits of Hispanic criminal street gangs. He testified generally concerning respect, claiming a gang, and backing up associate gang members. He did not provide any specific information about Martinez or Westside Santa Barbara. With the exception of a few brief answers concerning Martinez’s membership in a criminal street gang, nearly all Rodriguez’s testimony concerned the culture and habits of all Hispanic street gangs. Based on Rodriguez’s brief, innocuous testimony, we conclude the trial court properly ruled the evidence’s probative value outweighed its prejudicial effect.

Prejudice

Martinez contends Rodriguez’s testimony was unduly prejudicial because this was a close case and Rodriguez provided the jury with damning evidence that Martinez was a violent gang member predisposed to commit murder. Not so.

Absent fundamental unfairness, state law error in admitting gang evidence is subject to the traditional test under *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*).)

Here, we cannot conclude it is reasonably probable the result of the proceeding would have been different had Rodriguez not testified. Valencia testified Martinez was the first person to hit him and the first punch landed on his neck. Murdock, who was behind Valencia, saw Martinez strike Valencia on the chin or neck. Williams testified she saw Martinez with his arm raised and a knife in his hand stab Valencia three times. Forensic evidence revealed Valencia was a major contributor to blood on Martinez's exterior shirt sleeve. Finally, the trial court instructed the jury it could consider Rodriguez's testimony for the limited purposes described above.

In arguing the Rodriguez's testimony was unduly prejudicial, Martinez asserts the following: (1) Neither Valencia nor Murdock saw a knife in Martinez's hand; (2) Williams was intoxicated and looking through a window; (3) Williams' testimony did not match her statements to officers immediately after the incident; and (4) Forensic testing revealed Valencia's blood on Vera's hand. There was evidence to support all these assertions, but that is not the focus of our inquiry. Our inquiry is the following: Had Rodriguez not testified, is it reasonably probable the jury would have rendered a different verdict? We think not as the evidence established Martinez hit Valencia three times in the upper body, while Vera punched Valencia "square in the nose" before Murdock forcefully separated Valencia and his attackers and noticed blood gushing from Valencia's neck. Therefore, we conclude there was sufficient evidence Martinez committed deliberate and premeditated attempted murder when he stabbed Valencia three times, the first of which landed in one of the most vital areas, the neck.

Federal Constitutional Rights

Martinez complains admission of Rodriguez's testimony violated his federal constitutional rights. We disagree.

"[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*Partida, supra*, 37 Cal.4th at p. 439.) "Only if there are no permissible inferences the

jury may draw from the evidence can its admission violate due process. Even then, the evidence must “be of such quality as necessarily prevents a fair trial.” [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.’ [Citation.] ‘The dispositive issue is . . . whether the trial court committed an error which rendered the trial “so ‘arbitrary and fundamentally unfair’ that it violated federal due process.” [Citation.]’ [Citation.]” (*Albarran, supra*, 149 Cal.App.4th at pp. 229-230.)

As we explain above, Rodriguez had extensive experience investigating gang-related crimes. His testimony was relevant and rooted in facts shown by the evidence. Additionally, the evidence’s probative value outweighed its prejudicial effect, as it was limited to Martinez’s gang membership and the culture and habits of Hispanic criminal street gangs. This is distinguishable from *Albarran*, where the gang expert testified extensively concerning gang evidence that had no relevance and only served to inflame the jury. Thus, we conclude Martinez’s due process rights were not implicated.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.